BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM S. BODDE Claimant VS. **CI-LOR MANUFACTURING COMPANY, INC.** Respondent AND **UNITED STATES FIDELITY & GUARANTY CO.** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	Docket No. 168,479

ORDER

Respondent requests the Appeals Board to review an Award entered on December 2, 1994, by Administrative Law Judge Steven J. Howard. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

The respondent and its insurance carrier appeared by and through their attorney, Patricia A. Wohlford of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Patrick J. Gregory of Overland Park, Kansas. The claimant appeared not, as he had previously settled his claim with respondent. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The respondent appeals requesting Appeals Board review of the following issue in reference to the liability of the Kansas Workers Compensation Fund:

(1) Whether the respondent had knowledge of claimant's pre-existing low back impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the whole record and hearing arguments of the parties, the Appeals Board finds as follows:

At a Settlement Hearing held on June 30, 1994, claimant and respondent settled the claimant's claim for workers compensation benefits due to a low back injury that occurred on June 24, 1992, while working for the respondent. Such settlement was a strict compromise representing approximately a thirty-two and one-half percent (32.5%) permanent partial general disability. Respondent and its insurance carrier, during the settlement proceedings, reserved all of their rights and claims for future determination in regard to reimbursement against the Kansas Workers Compensation Fund (Fund). The issue of Fund liability was then litigated before the Administrative Law Judge who found the Fund to have no responsibility for any of the benefits paid to the claimant. The Administrative Law Judge found that the evidence failed to prove that it was more probably true than not that the claimant's pre-existing low back impairment was a disadvantage to him in obtaining and retaining employment.

In establishing Fund liability in workers compensation cases, the law should be liberally construed to carry out the legislative intent of encouraging employment of handicapped workers. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980). It is the respondent's burden to prove all of the elements of Fund liability. K.S.A. 1991 Supp. 44-567(b); Hinton v. S. S. Kresge Co., 3 Kan. App. 2d 29, 592 P.2d 471, rev. denied 225 Kan. 844 (1978).

The parties have narrowed the Fund liability issue to the statutory requirement of whether the respondent has proven that it had knowledge of the claimant's pre-existing impairment. K.S.A. 1991 Supp. 44-567(b). The Fund concedes that the evidence presented by the respondent establishes that the claimant's current disability resulting from his work-related injury would not have occurred but for his pre-existing impairment. K.S.A. 1991 Supp. 44-467(a).

In this case, the claimant, at the time of his injury on June 24, 1992, had been employed by the respondent since 1979. He injured his lower back while lifting a heavy bar weighing approximately two hundred and forty (240) pounds. Claimant received conservative medical treatment for some ten (10) months without sufficient relief. The claimant was treated by David K. Ebelke, M.D., an orthopedic surgeon from Kansas City, Missouri, specializing in treatment of the spine. Dr. Ebelke diagnosed bilateral L5 spondylolysis with a Grade II L5-S1 spondylolisthesis, as well as bilateral lumbar radicular syndrome secondary to foraminal encroachment on the L5 nerve root. Because claimant had not responded to conservative treatment, Dr. Ebelke, on May 4, 1993, performed a two-level fusion at L4-S1 with a bone graft and instrumentation. Dr. Ebelke was one of two orthopedic surgeons who testified in this case. He opined that the claimant's spondylolysis and spondylolisthesis conditions were present prior to his work-related injury. It was Dr. Ebelke's opinion that claimant's current disability would not have occurred but for his pre-existing underlying conditions. Dr. Ebelke was asked for his opinion regarding apportionment of claimant's pre-existing conditions to his problems after the June 24, 1992 injury. Dr. Ebelke replied that in this case apportionment was difficult because in certain instances the work-related injury is a higher percentage than the pre-existing condition. However, due to claimant's long history of the pre-existing condition and the progressiveness of the condition over the years, Dr. Ebelke opined that in this case the vast majority of the claimant's functional impairment rating would be related to the claimant's pre-existing condition.

The other orthopedic surgeon to testify, in the case at hand, was Edward J. Prostic, M.D. He examined and evaluated the claimant, at the request of claimant's

attorney, on August 9, 1993. In a supplemental report dated March 7, 1994, to the attorney for the respondent, Dr. Prostic expressed his opinion on claimant's pre-existing spondylolisthesis back condition and what relationship it had with the claimant's present work-related injury. Dr. Prostic opined that more probably than not claimant would not have sustained his work-related injury but for his pre-existing disease.

Claimant established through his testimony that either in 1977 or 1978 he received a medical discharge from the Army because he had a low back deformity. As early as 1982, claimant had back problems that were treated by a chiropractor when he slipped and fell at home. The chiropractor placed temporary restrictions on the claimant of no lifting over forty (40) pounds. He returned to work for the respondent with these restrictions. Claimant asserts that Mr. Blackburn, the respondent's owner, knew about his pre-existing back problems. Over the years he slipped on occasion at work and the respondent would refer him and pay for chiropractic treatment.

Claimant's employer, Robert Blackburn, also testified in this case concerning claimant's pre-existing back problems. He established that he knew of claimant's weak back because over the years claimant would have to receive chiropractic treatment. Also, claimant on occasion wore a corset to work that had a battery pack that sent charges to his back muscles. Mr. Blackburn testified that one of the reasons claimant had not unloaded a truck for the last five or six years was because of his back problems. This precaution was taken to avoid re-injury of claimant's back.

The Fund's basic argument is that all the respondent knew about claimant's pre-existing low back impairment was that claimant had a sore back. However, as previously stated, the Fund acknowledges that the medical evidence in this case specifically establishes that claimant's pre-existing spondylolisthesis was a permanent impairment and his current resulting disability would not have occurred but for such pre-existing condition. It is the Appeals Board's analysis of the Fund's argument that it is asserting that before the respondent can prove that it had knowledge of the claimant's pre-existing impairment that it has to have specific knowledge of the exact nature of the condition. The Appeals Board disagrees with this argument and finds that the knowledge of the claimant's pre-existing impairment does not have to be particular and medically specific. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987).

For the specific reasons stated above, the Appeals Board finds that the claimant was a handicapped employee as a result of his pre-existing low back impairment and was retained by the respondent after respondent had knowledge of the pre-existing impairment. Accordingly, the decision of the Administrative Law Judge is reversed and the Kansas Workers Compensation Fund is hereby ordered to pay one hundred percent (100%) of all workers compensation benefits and costs accrued in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard, entered on December 2, 1994, should be, and hereby is, reversed and that the Kansas Workers Compensation Fund is ordered to pay one hundred percent (100%) of all workers compensation benefits and costs accrued in this matter.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patricia A. Wohlford, Overland Park, KS
Patrick J. Gregory, Overland Park, KS
Steven J. Howard, Administrative Law Judge
George Gomez, Director